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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PUREWICK CORPORATION,)
)
) Plaintiff,)
) C.A. No. 22-102 (MN)
v.)
)
SAGE PRODUCTS, LLC,)
)
) Defendant.)

Friday, February 17, 2023
1:00 p.m.
Markman Hearing

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA
United States District Court Judge

APPEARANCES:

SHAW KELLER LLP
BY: JOHN W. SHAW, ESQ.

-and-

QUINN EMANUEL URQUHART & SULLIVAN
BY: BRIAN P. BIDDINGER, ESQ.
BY: NICOLE FELICE, ESQ.

Counsel for the Plaintiff

1 APPEARANCES CONTINUED:

2 YOUNG CONAWAY STARGATT & TAYLOR, LLP

3 BY: ANNE SHEA GAZA, ESQ.

4 BY: SAMANTHA G. WILSON, ESQ.

5 -and-

6 McANDREWS HELD & MALLOY

7 BY: CHRISTOPHER M. SCHARFF, ESQ.

8 BY: RYAN J. PIANETTO, ESQ.

9 BY: ROBERT SURRETTE, ESQ.

10 Counsel for the Defendant

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THE COURT: All right. Good afternoon,

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everyone, and please be seated. All right. Let's start

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with some introductions.

13:01:11 16

Mr. Shaw.

13:01:12 17

MR. SHAW: Good afternoon, Your Honor. John

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Shaw for Plaintiff, PureWick. Joining me from Quinn

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Emanuel, Brian Biddinger and Nicole Felice. Mr. Cherny also

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asked me to send his regards. He's in Europe this week and

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unable to come.

13:01:28 22

THE COURT: Ms. Gaza.

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MS. GAZA: Good afternoon, Your Honor. Anne

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Gaza from Young, Conaway on behalf of Defendant, Sage. I'm

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joined today by Christopher Scharff, Robert Surrette, and

13:01:40 1 Ryan Pianetto of McAndrew Held & Malloy, as well as my
13:01:44 2 colleague, Samantha Wilson.

13:01:46 3 THE COURT: Great. Okay. Let's start with the
13:01:51 4 presentations and I'll let Sage go first.

13:01:55 5 MR. SCHARFF: All right. Good morning, Your
13:02:07 6 Honor. Christopher Scharff on behalf of Defendant, Sage
13:02:10 7 Products. I'll start with the next slide which is slide 1.

13:02:13 8 So as Your Honor knows, there are two patents in
13:02:15 9 this lawsuit, the '376 Patent and the '989 Patent, both of
13:02:19 10 which are directed to an apparatus or a method for receiving
13:02:21 11 discharged urine.

13:02:24 12 Let's turn to the next slide.

13:02:25 13 So the term that we're here to construe is the
13:02:29 14 term "fluid reservoir" which is a term that's found in every
13:02:31 15 claim of these two patents and it's found repeatedly through
13:02:35 16 the claims. For example --

13:02:36 17 THE COURT: Can I just ask --

13:02:39 18 MR. SCHARFF: Yes, Your Honor.

13:02:39 19 THE COURT: -- is it your position that this
13:02:41 20 term should have its plain and ordinary meaning?

13:02:42 21 MR. SCHARFF: It is.

13:02:42 22 THE COURT: And your proposal is what you think
13:02:43 23 is the plain and ordinary meaning?

13:02:44 24 MR. SCHARFF: That's exactly right, Your Honor.

13:02:50 25 THE COURT: And the test is the plain and

ordinary meaning to the person of ordinary skill in the art?

MR. SCHARFF: It is, yes.

THE COURT: Is everyone who testified at the trial, the first trial, a person of ordinary skill in the art?

MR. SCHARFF: Yes, Your Honor.

THE COURT: All right.

MR. SCHARFF: So this term appears repeatedly throughout the claims. For example, in claim 1 alone it recites a fluid impermeable casing having a fluid reservoir at the first end, and later it recites that the apparatus has to have a fluid support distinct from that fluid reservoir, a tube disposed in that reservoir and at the end and importantly recites that the apparatus has to be configured so that urine is received into that reservoir.

Next slide.

So what is the parties' disagreement over this term? So here we have the parties' two constructions. So PureWick's construction is that a reservoir is simply anyplace where urine can collect, whereas Sage's construction is a structure that aggregates urine.

So before I get into the differences, I can give a brief preview of why we think the intrinsic evidence supports our construction.

Go to slide 11.

13:03:55 1 So I'll explain how the claims themselves
13:04:00 2 support our construction. For example, they repeatedly
13:04:04 3 refer to the reservoir as a structure. For example, claim
13:04:07 4 3, wherein the reservoir is formed of polymer. A place
13:04:10 5 can't be formed of polymer.

13:04:13 6 Slide 12.

13:04:14 7 I'll explain how the specification repeatedly
13:04:17 8 refers to the reservoir as doing more than just collecting
13:04:20 9 fluid, it also has to hold fluid.

13:04:23 10 And slide 14.

13:04:24 11 And then we'll also discuss how in the
13:04:26 12 prosecution history, PureWick specifically told the Patent
13:04:28 13 Office and the public what the definition of a reservoir is,
13:04:31 14 and that's a cavity or part that holds some fluid or
13:04:34 15 secretion, not simply is capable of.

13:04:36 16 Let's go back to slide 3, please.

13:04:41 17 All right. So the parties' disagreement over
13:04:44 18 this term is in three areas. So first, collect versus
13:04:47 19 aggregate. Two, whether or not it's enough for something to
13:04:50 20 just hypothetically collect or aggregate urine or whether it
13:04:53 21 must actually be configured for doing that. And then third,
13:05:00 22 whether a reservoir can simply be some arbitrary place in a
13:05:03 23 device or whether it has to be an identifiable structure.

13:05:06 24 PureWick claims that the differences between
13:05:10 25 these constructions are just semantic. And then obviously

13:05:10 1 the question is why PureWick didn't agree with our
13:05:14 2 construction. But as I will explain, these differences are,
13:05:17 3 in fact, significant.

13:05:17 4 So before I get into our construction, it helps
13:05:20 5 to understand the context of why the parties are disputing
13:05:23 6 this claim term. So first we're disputing this construction
13:05:27 7 because PureWick is taking a different construction or
13:05:31 8 different position versus what it argued in *PureWick I*. In
13:05:36 9 *PureWick I*, PureWick argued that a space in the Van Den
13:05:40 10 Heuvel reference wasn't a reservoir because it didn't
13:05:42 11 actually aggregate urine in use even though urine was
13:05:47 12 channeled into that space.

13:05:48 13 PureWick II, PureWick is arguing that an alleged
13:05:51 14 space at the end of our device is a reservoir regardless of
13:05:55 15 whether it actually aggregates urine. PureWick says over
13:05:58 16 and over in its brief that it's not taking inconsistent
13:06:02 17 claim construction positions, but they never provide an
13:06:04 18 answer to this. This contradiction is irreconcilable.

13:06:09 19 Next slide, please.

13:06:10 20 On top of that, we're also disputing this term
13:06:12 21 because in this current lawsuit, PureWick has not identified
13:06:12 22 any actual structure in our accused product that it believes
13:06:13 23 is a reservoir and that's because PureWick wants a
13:06:22 24 construction that is so vague and arbitrary that it can
13:06:25 25 literally just trace out any portion of anyplace in a urine

13:06:30 1 collection device that can collect urine and call that the
13:06:34 2 reservoir.

13:06:34 3 So under PureWick's construction, a place that
13:06:38 4 can collect urine, that can include the space between the
13:06:42 5 fibers and the stuffing, the space around the tube, the
13:06:44 6 space in the tube, really anywhere in the device can collect
13:06:48 7 urine. So the issue is that PureWick's construction doesn't
13:06:51 8 do anything to help the jury understand what is and isn't a
13:06:56 9 reservoir and to help third parties, competitors, understand
13:06:59 10 what it is in order to avoid infringement.

13:07:03 11 Next slide, please.

13:07:04 12 THE COURT: Hold on one second. I want to find
13:07:08 13 something in the brief.

13:07:13 14 MR. SCHARFF: All right.

13:07:13 15 THE COURT: In PureWick's paper from yesterday,
13:07:18 16 it says Sage agrees that structure does not require a
13:07:21 17 separate structure. Thus, the reservoir can be an
13:07:26 18 integrally formed part of the casing. Is that correct?

13:07:30 19 MR. SCHARFF: That's correct, we're not saying
13:07:31 20 it has to be a separate structure.

13:07:32 21 THE COURT: Accordingly, if structure is used in
13:07:35 22 the construction it would be more accurate to say a
13:07:37 23 structure or part of a structure that provides a place where
13:07:41 24 fluid can collect. Do you agree that the construction could
13:07:42 25 be a structure or part of a structure?

13:07:49 1 MR. SCHARFF: I think it's the part of the
13:07:51 2 structure that we would still have the issue with.

13:07:53 3 THE COURT: But if it's integrated in it, if the
13:07:57 4 reservoir is integrated into the casing, the reservoir is
13:08:01 5 not the entire casing, so why wouldn't it be part of the
13:08:05 6 structure?

13:08:06 7 MR. SCHARFF: Yeah, so there is still a
13:08:08 8 structure, if that's what you're referring to possibly, but
13:08:10 9 if you're talking about the structure being the end of the
13:08:13 10 casing, that's defining the reservoir. I think our main
13:08:17 11 issue with our construction is if you just say place, a
13:08:20 12 place is unbounded by any reference to a structure, whereas
13:08:24 13 in -- they know, they had repeatedly referred to in the
13:08:28 14 prosecution history a cavity or void space that holds urine,
13:08:31 15 now -- and they repeatedly did that by reference to
13:08:37 16 structures, so the issue is yeah --

13:08:39 17 THE COURT: I mean, they did say in the
13:08:41 18 prosecution that it's a void space, so why is a space rather
13:08:48 19 than a structure, why is space wrong?

13:08:51 20 MR. SCHARFF: So if you can, let's go to slide
13:09:00 21 10. So the issue is space might be fine, but their
13:09:02 22 construction is place. And everywhere in the prosecution
13:09:10 23 history, they reference that void, the cavity or void space
13:09:14 24 by referencing the structures that bounded it.

13:09:17 25 Now, we obviously agree that reservoir is a

13:09:21 1 structure and the space inside of that structure, it just
13:09:25 2 can't be an arbitrary place. You can't just point to say
13:09:29 3 well, I think the reservoir is the first quarter of an inch
13:09:32 4 of it, or I think the reservoir is the bottom and I'm going
13:09:36 5 to trace a jagged line and say that that's the reservoir.
13:09:39 6 There has to be some way for the public and the jury to know
13:09:42 7 what is a reservoir and does this accused structure have
13:09:45 8 one.

13:09:45 9 THE COURT: Just so we're clear, though, you
13:09:47 10 think space is better than place?

13:09:50 11 MR. SCHARFF: Yes, Your Honor.

13:09:51 12 THE COURT: Okay.

13:09:51 13 MR. SCHARFF: Can we go back to slide 6.

13:09:54 14 Now, here you can see exactly how PureWick is
13:10:05 15 purposefully being vague. On the left in their claim
13:10:08 16 construction brief they claim that they're expressly saying
13:10:11 17 that the reservoir is just the space at the bottom of the
13:10:14 18 device between the permeable support and the casing, and
13:10:18 19 they say that they are expressly not claiming that the
13:10:20 20 reservoir includes the permeable support. Then if you look
13:10:22 21 on the right, you can see that PureWick does have an arrow
13:10:27 22 that points to the reservoir is including some arbitrary
13:10:30 23 area in the permeable support. And, you know, the reason
13:10:32 24 for that has to do with satisfying other claim limitations.

13:10:32 25 Next slide, please.

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13:12:0225

13:12:03 1 definition specifically says that aggregate is doing more
13:12:07 2 than collecting, it's collecting and gathering into a mass
13:12:09 3 or hole and it's that part of it that the word "collect" is
13:12:13 4 missing. It's this concept of it's holding, it's collecting
13:12:17 5 and holding urine.

13:12:20 6 THE COURT: Show me.

13:12:29 7 MR. SCHARFF: And, Your Honor, also just to back
13:12:31 8 up a bit on the space versus place issue, I wanted to
13:12:34 9 clarify, space alone isn't enough, it has to be a space
13:12:37 10 bounded by something, a structure.

13:13:00 11 THE COURT: Okay. In the specification it says
13:13:01 12 reservoir 110 can be any suitable shape and/or size capable
13:13:04 13 of collecting fluid transported through the permeable
13:13:10 14 support. So where does that say collecting and holding
13:13:14 15 because you are saying they are defining it as collecting
13:13:18 16 and holding.

13:13:19 17 MR. SCHARFF: No, Your Honor, to be clear, when
13:13:20 18 I was referring to collecting and holding, I was saying that
13:13:24 19 -- so the specification refers to multiple properties of a
13:13:26 20 reservoir. One of the properties of the reservoir is that
13:13:28 21 it collects, another property is that it holds. Our
13:13:32 22 construction reads on all of those properties, PureWick's
13:13:35 23 construction only reads on one of them. So --

13:13:37 24 THE COURT: How can you hold it if you're not
13:13:39 25 collecting it?

13:13:41 1 MR. SCHARFF: So collecting is just drawing
13:13:43 2 something in. And you can collect fluid that just
13:13:45 3 immediately passes through the device, it's never actually
13:13:49 4 held or stored.

13:13:52 5 So then can we go to slide 8. Now, this is the
13:14:00 6 second dispute that we have is probably a bigger dispute and
13:14:03 7 this is the difference -- a difference that PureWick did not
13:14:06 8 concede and that's the difference between a structure that
13:14:09 9 actually aggregates urine versus just a place that
13:14:12 10 theoretically can do so. Now, again, the claims require a
13:14:14 11 reservoir, not just a structure that's hypothetically
13:14:16 12 capable of having one property of a reservoir. Otherwise
13:14:19 13 under their construction, again, a place where urine can
13:14:21 14 collect, that could read on literally anyplace in any of
13:14:23 15 these devices. Between the fibers. The space around the
13:14:26 16 tube.

13:14:29 17 Now, the case law that we had cited holds that
13:14:31 18 if a claim recites a specific structure, then to infringe,
13:14:34 19 the accused product must have that actual structure, not
13:14:37 20 just a structure that's capable of being that structure.

13:14:40 21 I'll note that for the *Acco Brands* case in
13:14:43 22 particular, PureWick's only argument to distinguish that is
13:14:46 23 they said well *Acco* involved method claims, so that's
13:14:49 24 inexplicable and that's actually incorrect. It involved an
13:15:01 25 apparatus claim. It was an apparatus claim that had a

specific pin structure but that pin structure didn't actually lock, so it wasn't a locking pin even though it could, it was theoretically capable of it, it just wasn't configured to do that, and so as a result there is no infringement.

As a result there is the VDO case, a District of Delaware case that construed the similar term fuel reservoir --

THE COURT: What do we do about your expert's definition when reading his deposition from the prior case, and he says "a casing having a fluid reservoir at the first end and a fluid outlet at the second end, so I used fluid reservoir to mean the same thing that anyone, any ordinary person skilled in the art would understand, it's an area where fluid can collect."

MR. SCHARFF: Yes. So you have the transcript in front of you, PureWick had not cited the statements before and after that. And on page 76 --

THE COURT: I read the ones before where they're just saying what is fluid reservoir and he says I used what the court said and they said well, we didn't -- the court didn't construe it, so what's after?

MR. SCHARFF: Before he's saying it's a fluid reservoir on the first end, he's talking about the first end of the casing, so he is talking about it being defined by

13:16:26 1 some boundary support, and then after --

13:16:29 2 THE COURT: He says, "I used fluid reservoir to
13:16:32 3 mean the same thing that anyone, any person, any ordinary
13:16:38 4 person skilled in the art would understand. It's an area
13:16:40 5 where fluid can collect."

13:16:41 6 I mean, that's not terribly ambiguous.

13:16:45 7 MR. SCHARFF: And then the --

13:16:47 8 THE COURT: And he didn't say it's all
13:16:49 9 structure, whatever.

13:16:50 10 MR. SCHARFF: Then the sentence after that, he
13:16:52 11 also said it can collect temporarily or collect permanently,
13:16:54 12 it shows he's referring to collect in his reference as
13:16:56 13 storing. Regardless, so what he said it can't mean
13:17:00 14 PureWick's definition because that would be inconsistent
13:17:02 15 with the spec, it would be inconsistent with the prosecution
13:17:10 16 --

13:17:11 17 THE COURT: Where did he say that?

13:17:12 18 MR. SCHARFF: I'm sorry?

13:17:13 19 THE COURT: You said that he said that it would
13:17:15 20 be inconsistent.

13:17:17 21 MR. SCHARFF: No, I'm sorry, Your Honor, I am
13:17:19 22 saying that -- I am saying that their characterization of
13:17:21 23 what Mr. Sheldon had said can't mean that he is agreeing
13:17:23 24 with their definition because their definition simply does
13:17:25 25 not work with the intrinsic evidence. The intrinsic

13:17:32 1 evidence is the most important followed by testimony of
13:17:35 2 experts which would be extrinsic evidence.

13:17:38 3 THE COURT: Okay. And since I read from the
13:17:41 4 specification where it said the reservoir 110 can be
13:17:47 5 anyplace where urine collects, any suitable shape or size
13:17:52 6 capable of collecting fluid.

13:17:56 7 MR. SCHARFF: Uh-huh. So that's a description
13:17:59 8 of one property. For example, a car can transport people
13:18:01 9 from point A to point B. That's not a definition of a car.

13:18:05 10 THE COURT: Yes. But that is a reservoir that
13:18:07 11 is covered in the claims of the patent.

13:18:11 12 MR. SCHARFF: Absolutely.

13:18:12 13 THE COURT: Reservoir 110.

13:18:14 14 MR. SCHARFF: Yep.

13:18:14 15 THE COURT: So they are defining reservoir 110
13:18:17 16 as being something that can collect fluids. I'm not
13:18:20 17 understanding why you're saying oh, but they're very clear
13:18:23 18 that it must do more.

13:18:25 19 MR. SCHARFF: Because that statement is not a
13:18:27 20 definition.

13:18:28 21 THE COURT: I know it's not a definition, but
13:18:29 22 it's consistent with the plain and ordinary meaning
13:18:32 23 according to your expert and you're saying wait, no, they
13:18:34 24 are saying more in the specification. Tell me what it is
13:18:35 25 that I am supposed to say oh, they're using it in connection

13:18:43 1 with the plain and ordinary meaning as Defendant's expert
13:18:47 2 recognized, but it's not enough.

13:18:48 3 MR. SCHARFF: Yeah, can we go to slide 12,
13:18:51 4 please. So these are instances in which the specification
13:18:57 5 refers to collecting and holding --

13:18:59 6 THE COURT: Okay. Hold on. Let me make sure we
13:19:01 7 read those in context. Let me pull that up. Exhibit 3 to
13:19:19 8 what?

13:19:20 9 MR. SCHARFF: Column 7, Exhibit 3 to our brief,
13:19:23 10 so that's the --

13:19:24 11 THE COURT: Exhibit 3.

13:19:26 12 MR. SCHARFF: I'm sorry, this should be
13:19:28 13 Exhibit 1. That should be Exhibit 1, the '376 Patent.

13:19:42 14 THE COURT: So I guess what I need to understand
13:20:39 15 is as I read from column 7, lines 38 through 52, why is it
13:20:47 16 not that we're starting off with something broad saying the
13:20:51 17 reservoir can be anything, any shape, size, that's capable
13:20:55 18 of collecting fluid, and then they narrow it, some
13:21:00 19 implementations say they can temporarily hold it, in others
13:21:02 20 they can hold large amounts, in some implementations it can
13:21:12 21 collect it and hold it. You want me to say it must collect
13:21:14 22 and hold, and what I am not understanding is why when you
13:21:18 23 start with something broad and then you say some it does
13:21:21 24 this, some in addition it does this, some in addition it
13:21:24 25 does this, why am I supposed to take the last of those

13:21:29 1 things and ignore what started it?

13:21:31 2 MR. SCHARFF: So I don't think that what we're
13:21:34 3 saying is that these are alternative embodiments. It's
13:21:39 4 describing that the reservoir can either temporarily hold it
13:21:44 5 or it can hold it for a long time. It can hold a large
13:21:47 6 amount. It can hold a small amount. But I don't think that
13:21:50 7 there is -- that it's describing that it is enough to be a
13:21:54 8 reservoir to just collect, period, and never --

13:21:58 9 THE COURT: Isn't that what it says in the first
13:22:00 10 -- I mean, it says in the first -- first it says can be any
13:22:05 11 suitable size or shape capable of collecting fluid.

13:22:09 12 MR. SCHARFF: Uh-huh.

13:22:10 13 THE COURT: Any old shape that is capable of
13:22:13 14 collecting. In some implementations, it can be this, for
13:22:16 15 example, this, for example, it can be sized to collect a
13:22:20 16 little bit of urine, then we have in some implementations it
13:22:23 17 can be sized that it holds a lot of urine. In some
13:22:27 18 implementations it can be sized so that it can hold a small
13:22:30 19 or a large amount of urine. In some implementations it's
13:22:34 20 configured to hold -- I mean --

13:22:38 21 MR. SCHARFF: I think one thing that might help
13:22:42 22 is if we turn to slide 16. So all of these are just
13:22:46 23 describing properties of a reservoir. Saying the reservoir
13:22:50 24 just has to be big enough to collect urine, that does not
13:23:00 25 mean that that is the only property required of a reservoir.

13:23:03 1 If you look at the ordinary meaning of the term reservoir in
13:23:06 2 the dictionary definitions, they consistently reflect that
13:23:10 3 it is not enough to just collect liquid, it's collect and
13:23:14 4 store. For example, collect it and kept in quantity. So
13:23:21 5 let's go back to slide 12, unless Your Honor would like to
13:23:25 6 look at this more.

13:23:27 7 Actually let's go back to slide 9, please. So
13:23:37 8 then coming back to this capability versus actuality issue,
13:23:43 9 so again, one of the big things that we're fighting over is
13:23:47 10 whether or not it's enough to just be capable of collecting,
13:23:51 11 aggregating urine or whether it has to actually do so, be
13:23:57 12 configured to do so. One of the things that's telling here
13:24:01 13 is PureWick several times in its brief said that -- pointed
13:24:03 14 to the claims saying that the apparatus is configured to
13:24:06 15 receive urine. And the Federal Circuit has several times
13:24:11 16 said if you use that language configured to, configured to
13:24:17 17 does not mean simply capable of, that it has to be actually
13:24:21 18 designed or constructed to be used that way.

13:24:24 19 THE COURT: No, I get that. But you're citing a
13:24:29 20 brief and then construing the words they used in the brief.
13:24:32 21 I'm looking at the specification and the specification
13:24:35 22 doesn't say configured to, it says capable of.

13:24:38 23 MR. SCHARFF: The claim actually does, Your
13:24:42 24 Honor, at the end of claim 1, for example, it says
13:24:45 25 configured to, claim 1 of the '376 Patent. It is the --

13:24:56 1 that last paragraph or limitation, the apparatus configured
13:25:01 2 to be.

13:25:10 3 THE COURT: We're talking about the reservoir,
13:25:12 4 not the apparatus that has all these other things. Your
13:25:16 5 configured to seems awfully distinct from the word
13:25:22 6 reservoir, and in fact in the patent specification when it
13:25:25 7 talks about the reservoir, it says capable of.

13:25:27 8 MR. SCHARFF: Yeah, but the rest of that
13:25:28 9 limitation says --

13:25:29 10 THE COURT: Tell me what the -- in *ParkerVision*
13:25:31 11 *v. Qualcomm*, where was the configured to language and what
13:25:31 12 was the -- give me the specifics of that?

13:25:41 13 MR. SCHARFF: I apologize, I don't have that.

13:25:41 14 THE COURT: How about *In re Giannelli*?

13:25:41 15 MR. SCHARFF: I'm sorry, I don't have the
13:25:49 16 specifics of what those claim limitations were. We're just
13:25:51 17 citing those for that general proposition that configured is
13:25:51 18 not the same as capable of the last limitation in the '376
13:26:01 19 Patent. Yes, it's saying the apparatus is configured to,
13:26:04 20 but that apparatus has to be configured to have a reservoir
13:26:07 21 that receives urine. So PureWick is trying to make it sound
13:26:13 22 like we're trying to turn the apparatus claim into a method
13:26:17 23 claim and we're not. We're saying when you recite an
13:26:21 24 apparatus claim that requires a reservoir, it has to
13:26:24 25 actually be configured as a reservoir, not some structure

13:26:27 1 that hypothetically could act as a reservoir if you change
13:26:32 2 the conditions or configurations or something.

13:26:34 3 THE COURT: Can I ask you a question, then?
13:26:37 4 Back to column 7, it says the reservoir can function as a
13:26:49 5 sump. The reservoir can form a portion of a passageway for
13:26:54 6 urine from the permeable membrane. Isn't that just talking
13:26:57 7 about it as a passageway, not as a place where it holds it?

13:27:02 8 MR. SCHARFF: No, Your Honor, that reference to
13:27:03 9 the sump, that's what it's referring to, a sump is a holding
13:27:07 10 and storage place for urine. Like a sump pump in your
13:27:11 11 basement, it's for pumping out the sump, that collection,
13:27:21 12 the aggregation area.

13:27:27 13 Turn to slide 10.

13:27:31 14 And then the third area in which we disagree is,
13:27:41 15 and we had touched on it a little bit already, this
13:27:45 16 distinction between a place versus a structure. PureWick
13:27:48 17 claims that they don't think that there is any distinction,
13:27:51 18 but there is, it has to do with the fact that a place is
13:27:54 19 just arbitrary, unbounded. And here the patent
13:27:57 20 specification claims are very clear. The specification
13:28:00 21 repeatedly refers to the reservoir as a tangible structure,
13:28:04 22 not just an arbitrary place inside the device with no
13:28:08 23 defined boundaries. And we referenced some figures, but
13:28:12 24 then again, we reference, for example, dependent claim 3
13:28:16 25 wherein the reservoir is formed of polymer. And so again,

13:28:22 1 just pointing to some arbitrary place inside a device,
13:28:26 2 that's not something that can be formed of polymer. And the
13:28:30 3 independent claim 1 has to be read consistently with that
13:28:34 4 dependent claim 3.

13:28:36 5 Next slide, please. Actually let's go to slide
13:28:40 6 13, please.

13:28:44 7 Our construction also is consistent with the
13:28:48 8 prosecution history. The Patent Office had originally
13:28:52 9 rejected the claims in view of this Kuntz reference. In
13:28:57 10 particular the Patent Office argued yeah, it has a reservoir
13:29:00 11 because you could just call an arbitrary end of that device
13:29:03 12 a reservoir because it would hold fluid at the end.

13:29:06 13 Now, next slide.

13:29:10 14 PureWick, however, argued that Kuntz did not
13:29:13 15 have a reservoir. PureWick specifically told the Examiner
13:29:16 16 and the public that the definition of a reservoir is a
13:29:19 17 specific cavity or part that holds some fluid or secretion,
13:29:23 18 and they repeatedly referred to it as something bound by
13:29:26 19 structures, bound by the casing or the end cap, and yes, it
13:29:30 20 includes that spacing inside of it --

13:29:33 21 THE COURT: What about the -- wasn't there some
13:29:36 22 place that PureWick cited where they said something a little
13:29:40 23 bit broader than that?

13:29:43 24 MR. SCHARFF: Yeah, so PureWick --

13:29:46 25 THE COURT: If you're pointing me to the

13:29:49 1 prosecution history, you might as well tell me why I'm
13:29:52 2 supposed to look at that and say oh, they clearly limited it
13:29:56 3 when they also said stuff that's broader.

13:29:59 4 MR. SCHARFF: Sure. That's not a problem. If
13:30:01 5 you have Exhibit 3 in front of you, and if you go to, for
13:30:07 6 example, the page that ends in PureWick 481. So we had
13:30:16 7 highlighted there where PureWick had cited to the Webster's
13:30:21 8 dictionary. And then let me see if you go to the top of
13:30:39 9 page 482, the last sentence in that paragraph, PureWick is
13:30:45 10 relying on that sentence where it says, "Accordingly when
13:30:48 11 read in light of the specification, Applicant's term
13:30:51 12 'reservoir' should be read as a cavity or void space."

13:30:54 13 They say okay, that means the same thing as
13:30:56 14 place. It doesn't because if you look, for example, on
13:31:00 15 page 481, they're talking about it as a cavity or void space
13:31:03 16 defined by some structure. They're pointing to structures
13:31:08 17 in their figures. And they're describing that -- so a
13:31:14 18 cavity by definition has to be defined by some structure,
13:31:17 19 you can't just have a cavity in some arbitrary thin air.
13:31:22 20 And so that is consistent with our construction, not
13:31:25 21 consistent with the reservoir just being a place.

13:31:28 22 And then if you can turn to slide 15, please.

13:31:32 23 THE COURT: So if I were to say a reservoir is a
13:31:36 24 cavity, or a space, you would be fine with that?

13:31:40 25 MR. SCHARFF: Well, for example --

13:31:44 1 THE COURT: They say Applicant's term reservoir
13:31:46 2 should be read as a cavity or void space.

13:31:49 3 MR. SCHARFF: I think the rest of the context of
13:31:51 4 what they had said here, that Webster's dictionary
13:31:55 5 definition that they gave --

13:31:56 6 THE COURT: You're not okay with where they say
13:31:59 7 that, you want me to go back to a different place where they
13:32:01 8 say it and say it's clear they meant the one and not the
13:32:04 9 other?

13:32:05 10 MR. SCHARFF: No, no, I'm saying they were
13:32:07 11 saying both things at the same time. They were saying that
13:32:09 12 -- so in order to overcome Kuntz, they were saying it
13:32:11 13 doesn't have any cavity or void space, but they're also
13:32:14 14 saying for it to be a reservoir, it has to be a cavity or
13:32:19 15 part that holds some fluid or secretion.

13:32:21 16 THE COURT: Where is the hold? Where is the
13:32:27 17 hold?

13:32:28 18 MR. SCHARFF: The top of page 481, where they
13:32:31 19 say --

13:32:31 20 THE COURT: Hold on. Webster's dictionary says
13:32:34 21 the cavity or part that holds some fluid or secretion. I
13:32:39 22 get it, that's Webster's dictionary. Then when they say
13:32:42 23 what they want it to mean, they say it should be read as a
13:32:46 24 cavity or void space.

13:32:50 25 MR. SCHARFF: I think those two are read

13:32:51 1 together. As I said, we would be fine with the Webster's
13:32:56 2 dictionary, when they were talking about the cavity or void
13:32:59 3 space, they were talking about one problem that the Kuntz
13:33:02 4 reference had, they weren't defining it there. They were
13:33:04 5 defining it when they said the definition of reservoir under
13:33:08 6 Webster's is X.

13:33:11 7 THE COURT: I mean, so they say consistent with
13:33:16 8 the dictionary meaning, the drawings of applicant's
13:33:19 9 application repeatedly demonstrate that the reservoir
13:33:21 10 disclosed therein is a cavity or void space within the
13:33:25 11 casing. For example, Figure 32 provides a cross-sectional
13:33:30 12 view of an assembly wherein the reservoir is clearly a void
13:33:35 13 space between the fluid impermeable casing, the fluid
13:33:38 14 permeable support, and the fluid permeable membrane. Again,
13:33:41 15 not hearing any words about holding.

13:33:44 16 Similarly, figures 1 and 2 show the reservoir
13:33:47 17 does not contain the permeable support or permeable
13:33:50 18 membrane. The specification states the membrane can be
13:33:54 19 arranged so that the fluid can flow through the permeable
13:33:57 20 membrane, through the permeable support into the reservoir
13:33:59 21 and out of the outlet. Again, nothing about holding in all
13:34:02 22 of that.

13:34:05 23 MR. SCHARFF: That's because --

13:34:07 24 THE COURT: I'm missing where it's like holding,
13:34:09 25 holding, holding, holding, you got to read holding in there,

13:34:13 1 but that's where I'm having a problem.

13:34:15 2 MR. SCHARFF: Yeah, because the issue with Kuntz
13:34:17 3 is there was no dispute that it held urine, the fight was
13:34:21 4 over whether or not it had a cavity or void space. They
13:34:24 5 were saying Kuntz could not be a reservoir because there is
13:34:29 6 no -- there is nothing in there that you can characterize as
13:34:32 7 a reservoir, there is no cavity or void space, the stuffing
13:34:37 8 goes all the way to the end. That's why they were focusing
13:34:40 9 on the cavity or void space, but they made clear when they
13:34:44 10 were referring to the figures, when they were referring to
13:34:45 11 the Webster's dictionary that they were talking about it in
13:34:48 12 the context of a structure and they were talking about it in
13:34:51 13 the context of holding urine.

13:34:54 14 THE COURT: Are you saying this with respect to
13:34:55 15 the prosecution, are you saying this is a disclaimer or al
13:35:00 16 la *Phillips*?

13:35:01 17 MR. SCHARFF: No, Your Honor, what we're saying
13:35:03 18 is the prosecution history, the intrinsic evidence informs
13:35:06 19 the claim construction. The *Vitronics* case that the -- the
13:35:10 20 single best reference for determining the meaning of the
13:35:12 21 claims is the intrinsic evidence which is the patent itself
13:35:14 22 and the prosecution history. We're not saying that this is
13:35:16 23 a disclaimer, this is just informative of the construction.

13:35:24 24 Can you turn to -- sorry, we have slide 15,
13:35:28 25 then.

13:35:29 1 So if you also look at what PureWick's expert
13:35:32 2 said in PureWick I, PureWick's expert also testified
13:35:37 3 consistent with our construction. We had talked before
13:35:40 4 about what our expert had said, so it's also relevant to
13:35:44 5 look at what their expert said. Mr. Jezzi specifically said
13:35:47 6 a reservoir is something that functions as a sump, is sized
13:35:52 7 to contain a volume of liquid, and so it's not just an
13:35:57 8 arbitrary place. But again, he plead it had to have this
13:36:01 9 concept of holding liquid and it wasn't just an arbitrary
13:36:04 10 place.

13:36:04 11 Next slide, please.

13:36:06 12 We already talked about the dictionary
13:36:08 13 definition. So the next slide. So then we already touched
13:36:13 14 a bit on what PureWick then said to overcome the Van Den
13:36:18 15 Heuvel reference. Now, PureWick in the *PureWick I* case
13:36:22 16 specifically said that you can see there is an orange traced
13:36:28 17 structure in Van Den Heuvel. And it said that is not a
13:36:31 18 reservoir because that doesn't aggregate urine. There was
13:36:36 19 no dispute again that urine does channel into that space, so
13:36:42 20 the argument that they made to get over it is urine doesn't
13:36:45 21 aggregate there.

13:36:47 22 PureWick had pointed to some other instances in
13:36:52 23 this trial where it said here in these other spots we did
13:36:54 24 say things consistent with our construction. PureWick has
13:36:57 25 never been able to explain or reconcile what it said about

13:37:01 1 Van Den Heuvel and all of those other instances were in
13:37:03 2 connection with their infringement allegations, it just
13:37:06 3 shows that PureWick has consistently tried to take
13:37:10 4 inconsistent positions with respect to invalidity and
13:37:13 5 infringement.

13:37:14 6 THE COURT: What was the evidence? You keep
13:37:18 7 giving me -- you keep giving me references to closing
13:37:22 8 argument, which the jury was instructed is not evidence. So
13:37:27 9 what was the evidence that was put on about Van Den Heuvel?

13:37:31 10 MR. SCHARFF: So that is actually one of the
13:37:34 11 issues in our post-trial motions. So our expert on the
13:37:38 12 stand testified that Van Den Heuvel, that area highlighted
13:37:41 13 in orange is a reservoir. And then PureWick's expert didn't
13:37:44 14 say anything about Van Den Heuvel. It wasn't until
13:37:51 15 PureWick's counsel got up at closing and that's what he said
13:37:54 16 in closing argument, even though their expert had not
13:37:58 17 touched that.

13:37:59 18 THE COURT: They also cross-examined your expert
13:38:01 19 and it wasn't just the reservoir that was contested, right?

13:38:02 20 MR. SCHARFF: Yes. But this was again what they
13:38:04 21 said is required to be a reservoir in terms of Van Den
13:38:11 22 Heuvel.

13:38:13 23 Next slide, please.

13:38:16 24 And then if you also look at what PureWick has
13:38:19 25 said for purposes of infringement, they had repeatedly

13:38:23 1 argued that the reservoir was a structure, not just a place.
13:38:27 2 They pointed to the flexible cap, for example, they pointed
13:38:31 3 to the flexible cap in figures of the patent, they pointed
13:38:34 4 to a cap in our product, and they said that's the reservoir,
13:38:38 5 not some arbitrary place inside of it.

13:38:42 6 Next slide.

13:38:43 7 In the present lawsuit, however, PureWick has
13:38:48 8 switched positions because our new device doesn't have a cap
13:38:51 9 like that. There is no tangible structure that they can
13:38:54 10 point to and say that's the reservoir, so instead they say
13:38:57 11 the reservoir is some vague undetermined space that
13:39:00 12 apparently also includes part of the stuffing.

13:39:03 13 Next slide, please.

13:39:04 14 Under the law, however, we had cited the law
13:39:07 15 that PureWick can't take such shifting positions. This is a
13:39:10 16 classic case of judicial estoppel, a party can't prevail in
13:39:13 17 one case by taking a position in one proceeding and taking a
13:39:16 18 contrary position in the later proceeding to the prejudice
13:39:19 19 of their point. We have also said collateral estoppel
13:39:22 20 applies. This issue was decided. There was a final
13:39:25 21 judgment. They had an opportunity to be heard and
13:39:28 22 PureWick's only real comeback to this argument is they said
13:39:31 23 we didn't take inconsistent positions. But again, other
13:39:34 24 than them saying it they never explained how their position
13:39:37 25 on Van Den Heuvel is at all consistent with their current

13:39:47 1 construction.

13:39:47 2 And that's all I have, Your Honor.

13:39:57 3 THE COURT: Thank you. Just give me a second.

13:40:35 4 Okay. You also agree that the term reservoir, fluid
13:40:43 5 reservoir should have their plain and ordinary meaning to a
13:40:45 6 POSA?

13:40:46 7 MR. BIDDINGER: Yes, Your Honor.

13:40:47 8 THE COURT: You also agree that the experts who
13:40:50 9 testified at the first trial were POSAs?

13:40:52 10 MR. BIDDINGER: Yes, Your Honor.

13:40:53 11 THE COURT: Tell me about the space versus place
13:40:55 12 versus structure.

13:40:56 13 MR. BIDDINGER: So I don't think we perceive a
13:41:02 14 difference between space or place, Your Honor. We didn't
13:41:06 15 intend any difference when we said place.

13:41:09 16 THE COURT: How about structure?

13:41:10 17 MR. BIDDINGER: As we said in our brief, and I
13:41:13 18 think Your Honor noted, from our perspective, this space or
13:41:18 19 place is defined by a structure. There is no doubt about
13:41:23 20 that.

13:41:24 21 THE COURT: You're saying the reservoir doesn't
13:41:26 22 have to be its own structure, it can be incorporated into
13:41:30 23 some other structure?

13:41:31 24 MR. BIDDINGER: Absolutely, Your Honor. I don't
13:41:33 25 think there should be any dispute about that. The

13:41:34 1 specification is clear as examples in the claims show that.
13:41:38 2 So our point would simply be that consistent with the way
13:41:43 3 the parties treated the term in the last case, the way the
13:41:47 4 experts treated the term and the way that the reservoir is
13:41:50 5 designed to function, it's the space that matters. It's
13:41:53 6 provided by a structure, but it's -- you know, so that's why
13:41:58 7 we proposed in our footnote that if you used structure, it
13:42:03 8 should be a structure or part of a structure that provides a
13:42:06 9 place where urine can collect.

13:42:09 10 THE COURT: Okay. Now, what do you say about
13:42:12 11 this argument that, you know, you all are changing your
13:42:15 12 position. This is essentially the prior art and you want
13:42:19 13 collateral estoppel so you can just be free to argue
13:42:24 14 willy-nilly on infringement without having to worry about
13:42:27 15 getting into the prior art?

13:42:29 16 MR. BIDDINGER: I would first say I don't see
13:42:32 17 any difference in the position we're taking now versus the
13:42:35 18 position we took in the last case.

13:42:37 19 THE COURT: I understand that. But he had that
13:42:39 20 slide up there that showed the picture of their device, and
13:42:42 21 he says you've never explained how you're taking a different
13:42:44 22 -- how you're not taking a different position, how what
13:42:46 23 you're saying is consistent with what you said before, so
13:42:50 24 let's hear about it.

13:42:52 25 MR. BIDDINGER: Sure. So we've always proceeded

13:42:58 1 under the view that the fluid reservoir is the place where
13:43:03 2 fluid can collect. We identified the place --

13:43:05 3 THE COURT: You think aggregate and collect mean
13:43:09 4 the same thing?

13:43:10 5 MR. BIDDINGER: We do think they mean the same
13:43:12 6 thing. We cited definitions, Your Honor pointed out their
13:43:16 7 synonyms. I think our preference would have been to agree
13:43:19 8 to aggregate and to cut through all this. It seems to us
13:43:22 9 that they are implying something with the term aggregate
13:43:25 10 that goes above and beyond what I think it means and what
13:43:29 11 it's synonymous with in terms of collect and accumulate.
13:43:32 12 And that goes to Your Honor's points about hold.

13:43:35 13 And as a brief aside, I want to explain this and
13:43:39 14 answer Your Honor's question. But these devices are
13:43:42 15 designed and we can look at the specification. Your Honor
13:43:45 16 pointed right to where in the specification it talks about
13:43:49 17 it, for urine to be drawn in and go out, they're not
13:43:52 18 supposed to be filled up with a tube with urine, the
13:43:55 19 specification teaches how simultaneous the urine can come
13:44:00 20 into the reservoir and be drawn away from it. The only
13:44:03 21 concern we had about aggregate is they seem to be suggesting
13:44:06 22 that urine has to fill up in the device and be held there in
13:44:10 23 order to infringe. And all we're saying --

13:44:14 24 THE COURT: Show me how your position now is
13:44:17 25 consistent with what the position was on Van Den Heuvel.

13:44:20 1 MR. BIDDINGER: Sure. Our position now on their
13:44:22 2 device --

13:44:23 3 THE COURT: By the way, I recognize this isn't
13:44:25 4 actually relevant to claim construction, but given that I'm
13:44:28 5 trying to figure this all out, I'll ask you to help me out.

13:44:32 6 MR. BIDDINGER: Understood, Your Honor.

13:44:33 7 Counsel said that, you know, it can be anyplace,
13:44:38 8 it's an arbitrary place, anyplace --

13:44:41 9 THE COURT: Under PureWick's construction,
13:44:43 10 everything related to urine collection can collect urine.
13:44:47 11 Everything relating to a urine collection device can collect
13:44:50 12 urine including the space between fabric fibers, stuffing of
13:44:54 13 the device, inside the vacuum tube or even inside the
13:44:59 14 surface of the device. Aren't those all reservoirs?

13:45:03 15 MR. BIDDINGER: Because the claim doesn't
13:45:04 16 specifically say a fluid reservoir, it says a fluid
13:45:08 17 reservoir is at the first end of the device, it has got to
13:45:10 18 be located in a specific place. It says that the fluid
13:45:13 19 permeable support is distinct from and proximate from the
13:45:15 20 fluid reservoir so it's --

13:45:16 21 THE COURT: Those things might be fluid
13:45:19 22 reservoirs, but they are not the fluid reservoir of the
13:45:21 23 claim.

13:45:22 24 MR. BIDDINGER: Fair enough. We never said they
13:45:24 25 were fluid reservoirs, but they can't be the fluid

13:45:26 1 reservoirs of the claim. And it also, by the way, urine, it
13:45:30 2 has to be configured, the apparatus for urine, to go through
13:45:33 3 the opening in the impermeable layer, through the membrane,
13:45:37 4 through the support and into the reservoir, again, tells you
13:45:40 5 where it is, versus these other components, it can't just be
13:45:44 6 anywhere in the device.

13:45:45 7 THE COURT: All right. So I interrupted you.

13:45:47 8 MR. BIDDINGER: Our contention, there is a space
13:45:49 9 at the end, at the first end of their device where urine can
13:45:54 10 collect and where urine comes in through the fabric through
13:45:58 11 the support and into this space and then is drawn out of
13:46:01 12 that space through the tube that extends into it. And
13:46:04 13 that's our position, that's the exact same position that we
13:46:09 14 took about --

13:46:10 15 THE COURT: Why are you saying that's not
13:46:12 16 consistent with the position taken on Van Den Heuvel?

13:46:15 17 MR. BIDDINGER: All that we said about Van Den
13:46:18 18 Heuvel at the last trial, Your Honor pointed out, we did not
13:46:21 19 put an expert on it. They put an expert on it. If you look
13:46:24 20 at what their expert said about it, he said almost nothing.
13:46:27 21 He said there is a reservoir on this next element. And the
13:46:30 22 argument was, it's a failure of proof, number one, first and
13:46:33 23 foremost, that's what it was. But we didn't also say, I
13:46:37 24 think counsel said --

13:46:39 25 THE COURT: Nobody said it doesn't hold it in

13:46:42 1 there.

13:46:42 2 MR. BIDDINGER: Exactly, Your Honor. Counsel
13:46:44 3 suggested that we had said that -- I just want to get it
13:46:49 4 right, that we had argued that Van Den Heuvel didn't
13:46:53 5 actually aggregate urine. We didn't say that in closing
13:46:56 6 argument, we said that there is no reservoir where it could
13:47:01 7 aggregate. It's totally consistent with our construction
13:47:04 8 here. It has to have a place -- we can't say that no one
13:47:08 9 had proven that there was urine in this space in Van Den
13:47:11 10 Heuvel, it's a device, so the argument was in closing, it
13:47:15 11 was there is no place for fluid to aggregate, and --

13:47:22 12 THE COURT: Or accumulate in that space.

13:47:25 13 MR. BIDDINGER: And could accumulate in that
13:47:27 14 space. He did not testify that urine could accumulate in
13:47:30 15 that space.

13:47:30 16 THE COURT: Is accumulate the same as collect?

13:47:33 17 MR. BIDDINGER: Yes, we definitely think so,
13:47:36 18 Your Honor. And then Your Honor also noted -- the other
13:47:40 19 point and Your Honor already noted this on Van Den Heuvel is
13:47:52 20 there were other grounds for the jury to find, we can't say
13:47:56 21 that Mr. Cherny's closing argument, as stirring as it was,
13:48:01 22 proved anything --

13:48:02 23 THE COURT: I recognize that with respect to the
13:48:04 24 JMOL motion, but where this issue got my attention was what
13:48:08 25 do I do with respect to collateral estoppel if it's possible

13:48:14 1 that we're arguing something different, so I wanted to
13:48:18 2 understand what the plain and ordinary meaning is.

13:48:21 3 MR. BIDDINGER: Understood, Your Honor. I don't
13:48:28 4 have -- I think Your Honor picked up on a lot of things in
13:48:31 5 your questions. Just maybe a couple of points. This is
13:48:37 6 what you were looking at before, Your Honor recognized that
13:48:39 7 it starts out by saying the reservoir --

13:48:42 8 THE COURT: What do you say about the argument
13:48:44 9 that everything that comes after that is talking about
13:48:46 10 holding it, holding a lot, holding a little, holding it
13:48:50 11 temporarily, holding it for a long time, it's a sump, it's a
13:48:53 12 passage, it's whatever.

13:48:55 13 MR. BIDDINGER: I think it again goes to how
13:49:00 14 these devices are used. And to me the latter half of that
13:49:03 15 same paragraph in the specification talks about how the
13:49:10 16 urine is simultaneously removed, so it's configured to
13:49:15 17 collect and hold a small or large amount while it's
13:49:20 18 simultaneously removed, a temporary backup may occur.

13:49:25 19 THE COURT: You don't necessarily want the urine
13:49:28 20 to pool in there, but you want to have a place to pool if it
13:49:32 21 needs to as it's being sucked out.

13:49:34 22 MR. BIDDINGER: That's right, Your Honor. It's
13:49:37 23 also where the tube extends to, there has to be this space
13:49:39 24 where the urine flows down through the device into that
13:49:42 25 space and sucked out with the tube from the end of that tube

13:49:45 1 where the urine comes down to, the spec talked about gravity
13:49:49 2 or all these devices is through a vacuum, the urine flows
13:49:54 3 down the device in the bottom and is drawn out through the
13:49:57 4 tube. You're right, it may temporarily -- it depends on the
13:50:00 5 flow rate of the urine into the device, but it never
13:50:04 6 accumulate, it may go right through and be drawn out which I
13:50:08 7 think is the more ideal situation because you don't want it
13:50:12 8 to leak out.

13:50:16 9 I think the prosecution history got enough play.
13:50:21 10 But, you know, the point of the prosecution history and the
13:50:31 11 distinction that was made and what the applicants said was
13:50:36 12 that the reservoir has to be this space, there has to be
13:50:41 13 space. And really what it led to was the addition of that
13:50:46 14 claim limitation that the permeable support is distinct from
13:50:48 15 and at least proximate to the fluid reservoir. And that
13:50:52 16 came from this point of saying you can't have the permeable
13:50:56 17 support fill up the entire space in the device, which is
13:51:01 18 what the case was.

13:51:06 19 THE COURT: How about prosecution history?

13:51:08 20 MR. BIDDINGER: Yeah, that was the point I was
13:51:11 21 just talking about, Your Honor, was that the distinction
13:51:14 22 that was being drawn was there has to be this space, and
13:51:22 23 ultimately led to this limitation where that reservoir is
13:51:25 24 separate and distinct from the permeable support and that
13:51:28 25 was a distinction over Kuntz. In Kuntz, the core material

13:51:32 1 filled up the entire space. There was no space where a
13:51:36 2 reservoir could be. And that's the only distinction that
13:51:39 3 was being made. So it says, a cavity or void space within
13:51:39 4 the casing, Applicant's term "reservoir" should be read as a
13:51:39 5 cavity or void space. The point was that there was empty
13:51:53 6 space.

13:51:53 7 THE COURT: What about the definition that's
13:51:54 8 offered from Webster's and then we kind of keep going back
13:51:57 9 and saying so, oh, you're focusing on one part of that
13:52:02 10 because that was required, but the definition from Webster's
13:52:04 11 you gave included holding?

13:52:04 12 MR. BIDDINGER: I think the definition was, if
13:52:10 13 you look at that entire context, was talking about the fact
13:52:13 14 that a reservoir is a cavity or void space. That is the
13:52:17 15 distinction that they were drawing over Kuntz. There was no
13:52:21 16 discussion anywhere in the prosecution history about holding
13:52:25 17 urine at all, it was all about Kuntz has filling in the
13:52:29 18 entire space within the device whereas in our embodiments
13:52:33 19 the reservoir is a void space, an empty space, it's distinct
13:52:37 20 from the permeable support.

13:52:52 21
13:52:54 22 THE COURT: So remind me -- so I just want to
13:52:58 23 make sure I understand your position on structure. Is that
13:53:02 24 what you're getting to now, structure? You said something
13:53:06 25 like the space or the place or formed by a structure, but it

13:53:11 1 doesn't have -- so remind me again what you said so I can --

13:53:16 2 MR. BIDDINGER: Yeah. I think, Your Honor, the
13:53:17 3 point was the reservoir, the space or place provided that
13:53:23 4 the reservoir provides is what matters, the functionality of
13:53:27 5 the reservoir, that's where the urine can collect. We are
13:53:34 6 not disputing that that is formed by a structure, it doesn't
13:53:38 7 just exist in space, and I don't think -- we never argued
13:53:41 8 that. I don't know where that suggestion comes from.

13:53:43 9 So all I was saying is like in our footnote, if
13:53:47 10 there is a -- the Court wants to put structure into the
13:53:51 11 construction of this, we would say -- I think the footnote
13:53:53 12 says a structure or a part of a structure that provides a
13:53:57 13 place where urine can collect. So the structure forms the
13:54:01 14 space or part of a structure because it doesn't have to be a
13:54:05 15 separate structure, we're all in agreement there, provides a
13:54:09 16 place where urine can collect.

13:54:14 17 THE COURT: Okay.

13:54:24 18 MR. BIDDINGER: The only other points that I
13:54:27 19 had, I don't know that it's worth belaboring them, but Sage
13:54:31 20 keeps making this argument that right in page 1 of their
13:54:35 21 brief that their construction, a structure that aggregates
13:54:39 22 urine is exactly how PureWick used the term in *PureWick I* to
13:54:43 23 avoid the prior art. That's just not true. We never said
13:54:47 24 structure. And we never said that aggregates. We said
13:54:51 25 there is no place for fluid to aggregate. It's consistent

13:54:54 1 with our point that it doesn't have to be actually
13:54:56 2 aggregating to infringe.

13:54:58 3 And the same thing is true at the PTO, they said
13:55:01 4 that we told the PTO it has to be a structure that
13:55:05 5 aggregates urine. Those terms weren't used in the
13:55:08 6 prosecution history.

13:55:08 7 And then on judicial estoppel, counsel suggested
13:55:13 8 that our only basis for saying there shouldn't be judicial
13:55:19 9 estoppel is our positions weren't consistent and we
13:55:23 10 disagree. We don't believe we're being inconsistent at all
13:55:27 11 and Your Honor already touched on their expert saying the
13:55:30 12 exact same thing as us, they said the same thing, treated it
13:55:35 13 the same way in their invalidity contentions and in their
13:55:38 14 expert report. And, you know, again, this is just a
13:55:41 15 collection of our quotes from the prior case where our
13:55:45 16 expert said it's the area, the volume where urine can
13:55:48 17 accumulate, that's for infringement purposes. Empty space
13:55:53 18 where urine can accumulate, that was in the closing
13:55:56 19 statement, a place where urine could accumulate.

13:56:00 20 The other thing on judicial estoppel, we cited a
13:56:02 21 case which was in the Third Circuit indicating that for
13:56:04 22 there to even be judicial estoppel, the prior position has
13:56:10 23 to have been adopted by the court. I think here it's
13:56:12 24 questionable whether you can even make that determination of
13:56:20 25 whether or not the jury adopted something that was said in

13:56:25 1 closing statement in reaching its decision on the verdict.

13:56:29 2 I think there is multiple grounds and in that situation,

13:56:33 3 judicial estoppel is not appropriate.

13:56:37 4 Unless Your Honor has questions, I think that's
13:56:41 5 all that I have.

13:56:42 6 THE COURT: Okay.

13:56:51 7 MR. BIDDINGER: Thank you, Your Honor.

13:56:53 8 MR. SCHARFF: May I respond, Your Honor?

13:56:55 9 THE COURT: You may.

13:56:57 10 MR. SCHARFF: Thank you.

13:56:57 11 Can I have slide 24, please.

13:57:00 12 Now, Your Honor, I never heard Mr. Biddinger
13:57:14 13 explain if what is on the right is a reservoir, why isn't
13:57:19 14 what is on the left in Van Den Heuvel. Now, he argued, you
13:57:24 15 know, that when they were saying that Van Den Heuvel doesn't
13:57:29 16 have a reservoir that that was -- that they were somehow
13:57:34 17 arguing a failure to prove. No, they affirmatively said Van
13:57:37 18 Den Heuvel doesn't have a reservoir and they specifically
13:57:39 19 said because there is nothing about a reservoir where you
13:57:42 20 aggregate urine, they didn't say, you know, that it wasn't
13:57:44 21 because it couldn't aggregate or collect urine, there is
13:57:52 22 nothing about can in there, and they said that there was
13:57:56 23 nothing about a reservoir where you aggregate urine, they
13:58:00 24 were talking about a structure.

13:58:02 25 But again, at the end of the day, I have still

13:58:06 1 not heard any reason why that space on the left is not a
13:58:09 2 reservoir and that space on the right is. And that is why
13:58:13 3 their claim construction position is just fundamentally
13:58:17 4 irreconcilable and why we have this issue over collateral
13:58:21 5 estoppel, because if they are allowed to argue infringement
13:58:25 6 for the PrimaFit 2.0, they are directly contradicting what
13:58:30 7 they said in the prior art.

13:58:31 8 For example, I heard him say these devices are
13:58:34 9 designed so that urine goes into the device and is pulled
13:58:37 10 immediately out and it doesn't need to actually store, so
13:58:41 11 why doesn't Van Den Heuvel do that? And they never
13:58:44 12 explained. Our expert did, our expert testified that Van
13:58:47 13 Den Heuvel does do that and there was no contrary evidence.

13:58:50 14 THE COURT: Your expert's testimony I got to say
13:58:53 15 was less than compelling. All he said was yeah, there is
13:58:57 16 gravity in urine pools. It was pretty conclusory.

13:59:00 17 MR. SCHARFF: Well, I mean he pointed to the Van
13:59:04 18 Den Heuvel reference says urine is channeled into that end,
13:59:07 19 so why doesn't that make that a reservoir, because that's
13:59:11 20 exactly what they're arguing for purposes of infringement in
13:59:14 21 this second case.

13:59:18 22 And if I can go to slide 15. And actually go to
13:59:22 23 one slide before, please. One more before.

13:59:26 24 And then they said Kuntz, you know, really what
13:59:30 25 got over Kuntz was Kuntz didn't have a cavity or void space.

13:59:36 1 In the '989 Patent prosecution, the Examiner specifically
13:59:39 2 said that that space 22a was, in fact, a cavity or void
13:59:44 3 space.

13:59:44 4 And turn to slide 15, please. Mr. Jezzi,
13:59:49 5 however, says no, that's not a reservoir because it doesn't
13:59:55 6 allow free fluid to collect in there because it would get
14:00:00 7 absorbed into that material around it. It's not enough to
14:00:03 8 be a reservoir to have a cavity or void space, it has to be
14:00:06 9 able to hold urine.

14:00:07 10 THE COURT: The problem I have is you keep
14:00:09 11 telling me so he's saying. I'm not seeing it in the words,
14:00:12 12 it's your interpretation of the words and that's where
14:00:15 13 you're losing me because it's just like oh, and so read
14:00:19 14 between the lines and this is what they're saying and I'm
14:00:22 15 not getting it.

14:00:23 16 MR. SCHARFF: The third bullet point, Your
14:00:25 17 Honor, this is a quote from Mr. Jezzi's expert report,
14:00:29 18 paragraph 922, the Kuntz pad by nature of its design would
14:00:33 19 not allow free fluid to collect into the alleged space 22a,
14:00:36 20 it would be absorbed into the absorbent core material. It
14:00:40 21 wasn't the fact that it didn't have a cavity or void space.

14:00:50 22 Unless Your Honor has any other questions,
14:00:53 23 that's all I have.

14:00:56 24 THE COURT: Let me ask, what about the, i.e., a
14:01:00 25 sump, a space holding?

14:01:09 1 MR. BIDDINGER: First of all, Mr. Jezzi did not
14:01:11 2 testify about this at trial.

14:01:12 3 THE COURT: I know, it's irrelevant to the
14:01:15 4 jury's verdict, got it.

14:01:17 5 MR. BIDDINGER: Secondly, there were sort of
14:01:23 6 multiple reasons why Kuntz did not have a reservoir. The
14:01:28 7 Patent Office itself allowed the claims over it and it's
14:01:31 8 because there was no space that was separate and distinct
14:01:36 9 from the permeable support. That's the reason that the
14:01:40 10 claims were allowed over Kuntz. That's why that limitation
14:01:43 11 is in the claims, it says that permeable support has to be
14:01:46 12 distinct and proximate to the fluid reservoir. And that's
14:01:50 13 all that Mr. Jezzi was pointing out was that that space is
14:02:00 14 not a reservoir -- I mean, the Patent Office found it was
14:02:04 15 not a reservoir.

14:02:05 16 Part of the problem was that there is -- if we
14:02:10 17 look at the figure from Kuntz, on their slide 13, what they
14:02:20 18 were pointing to is this 22a which is where the tube that
14:02:24 19 pushed into in Kuntz, but it's completely surrounded by this
14:02:30 20 absorbent material, and so what Mr. Jezzi was saying was
14:02:34 21 that when you have this space surrounded by this absorbent
14:02:40 22 material, fluid is not going to collect in the space because
14:02:44 23 the fluid is drawn into the absorbent material that is
14:02:50 24 forming that space.

14:02:54 25 So I don't know what to make beyond that of

14:02:57 1 this, that's what he said, it would be absorbed into the
14:03:03 2 absorbent core material. It retains fluid in that core
14:03:07 3 material in contrast to the reservoir that has a space for
14:03:11 4 holding free liquid. I don't think there is anything
14:03:15 5 inconsistent with about that.

14:03:20 6 The other point to Van Den Heuvel, Van Den
14:03:23 7 Heuvel says nothing about a reservoir. There is no
14:03:25 8 disclosure anywhere in it that there is a reservoir. The
14:03:29 9 only thing that they've ever pointed to is that drawing
14:03:31 10 which has this little triangle at the bottom that's not
14:03:35 11 described as being a space or empty space or anything. And
14:03:38 12 so I don't think there is any inconsistency at all to say
14:03:41 13 that Van Den Heuvel does not disclose this limitation or
14:03:44 14 that they failed to prove that it disclosed this limitation
14:03:48 15 in our infringement position in this case.

14:03:51 16 THE COURT: Okay. All right. Let me go back
14:03:55 17 and take a look at these things and come back in about half
14:04:00 18 an hour.

14:04:02 19 (A brief recess was taken.)

14:52:12 20 THE COURT: Thank you for waiting. Sorry we're
14:52:14 21 a little late. Please be seated.

14:52:17 22 All right. At issue, there is one disputed
14:52:19 23 claim term in two patents. These patents were previously
14:52:22 24 litigated between these parties and resulted in a jury
14:52:25 25 verdict of infringement and no invalidity of the claims

14:52:29 1 asserted in that case. During that litigation, the parties
14:52:32 2 agreed that the term "fluid reservoir" or "reservoir" should
14:52:35 3 be given its plain and ordinary meaning. There was no
14:52:37 4 dispute or disagreement about the scope of that term.

14:52:40 5 In connection with this case, Plaintiff filed a
14:52:43 6 motion for judgment on the pleadings on the grounds that
14:52:45 7 collateral estoppel barred certain of Defendant's defenses.
14:52:50 8 As part of its response to that motion, Defendant's brief
14:52:53 9 asserted that there was a claim construction issue that
14:52:55 10 precluded my grant of the motion, but did not really
14:52:58 11 identify what that issue was. During the argument on the
14:53:01 12 12(c) motion, Defendant asserted that Plaintiff was
14:53:04 13 construing "reservoir" or "fluid reservoir" differently than
14:53:07 14 it had in the prior litigation. Plaintiff disagreed. I
14:53:12 15 agreed to hear this issue in an expedited manner so that I
14:53:16 16 could understand the arguments and rule on the pending
14:53:18 17 motion.

14:53:18 18 I am now prepared to rule on the claim
14:53:21 19 construction issue. I will not be issuing a written
14:53:23 20 opinion, but I will issue an order stating my rulings. I
14:53:26 21 want to emphasize before I announce my decision that
14:53:29 22 although I am not issuing a written opinion, we have
14:53:32 23 followed a full and thorough process before making the
14:53:35 24 decision I am about to state. I have reviewed the patents
14:53:38 25 in dispute. I have also reviewed the record from the prior

litigation, *PureWick Corporation v. Sage Products, LLC*, C.A. No. 19-1508-MN, which I will call "*PureWick I*". I have read the parties' letters regarding claim construction and all of the other references submitted in the many pages of exhibits. There was full briefing on the disputed term and argument today. All of that has been carefully considered.

As to my ruling, I am not going to read into the record my understanding of claim construction law. I have a legal standard section that I have included in earlier opinions, including my claim construction order in *PureWick I*. I incorporate that law and adopt it into my ruling today and will also set it out in the order that I issue.

The disputed term is "fluid reservoir" or "reservoir" in claims 1, 5 and 10 of the '376 Patent and claims 2, 3, 6 and 7 of the '989 Patent. Both parties argue that the term has its plain and ordinary meaning. Plaintiff proposes that meaning is "a place where urine can collect." Defendant proposes that meaning is "a structure that aggregates urine."

The dispute centers on whether there is a difference between "aggregate" and "collect," whether the term requires urine to be held in the reservoir rather than be capable of being held there and whether we need to refer to the reservoir as a structure. Here, I think the Plaintiff's statement of the plain and ordinary meaning is

14:55:10 1 the one supported by the intrinsic and extrinsic evidence
14:55:14 2 and is consistent with how the claim term was used in the
14:55:16 3 prior litigation. I will adopt that construction.

14:55:19 4 First, I can find no meaningful difference
14:55:28 5 between "aggregate" and "collect" in the parties'
14:55:31 6 constructions. According to Webster's New World College
14:55:35 7 Dictionary and The Chambers Dictionary, the two generally
14:55:35 8 mean the same thing. And as I pointed out during the
14:55:38 9 hearing, without objection or disagreement, looking at the
14:55:40 10 online thesaurus, the two words are synonyms.

14:55:41 1 Defendant, however, argues that there is a
14:55:41 2 distinction between "aggregate" and "collect" in that
14:55:41 3 "aggregate" suggests collecting and holding, while "collect"
14:55:51 4 does not require actually holding of fluid. I do not,
14:55:51 5 however, think that position is supported by the intrinsic
14:55:51 6 evidence cited. First, the specification states that the
14:56:01 7 "reservoir 110 can be any suitable shape and/or size capable
14:56:01 8 of collecting fluid transported through the permeable
14:56:11 9 support 140." It then goes on to give implementations and
14:56:12 10 examples where the reservoir collects and holds urine -
14:56:12 11 either a large amount or a small amount or does so
14:56:21 12 temporarily or more permanently. It also refers to the
14:56:21 13 reservoir forming part of a passageway and a sump. I do not
14:56:21 14 read those subsequent statements, however, to require the
14:56:30 15 reservoir to hold urine - particularly given the clear

statement that the reservoir can be of any size or shape capable of collecting fluid at the beginning of the paragraph before discussing embodiments. I also can discern no reason why holding urine would be required given that the purpose of the inventions appears to be preventing urine leaking from the devices, i.e., removing it rather than holding it. I understand that the device needs to be capable of holding it when necessary, but that is different from requiring it to hold fluid when not necessary.

Second, the prosecution read as a whole does not support Defendant's position. Defendant argues that during prosecution, Plaintiff distinguished the prior art reference Kuntz from its invention to overcome the Examiner's rejection. Plaintiff argued that Kuntz does not have a reservoir, which Plaintiff defined using Webster's dictionary as "a cavity or part that holds some fluid secretion," because "the core material of Kuntz fills the entire internal space within Kuntz's backing layer 36, so there is no room for a reservoir within the casing between the permeable support and the casing." There is no further discussion of holding fluid in the subsequent arguments made. Indeed, Plaintiff concludes its arguments, stating that "when read in light of the specification, Applicant's term 'reservoir' should be read as a cavity or void space." So I think that the intrinsic evidence supports Plaintiff's

14:58:02 1 proposed construction. And the only extrinsic evidence I
14:58:12 2 have from a POSA as to the meaning agrees. At his
14:58:16 3 deposition in the prior case, Defendant's expert testified
14:58:19 4 that he "used fluid reservoir" to mean "the same thing that
14:58:32 5 anyone, any ordinary person skilled in the art would
14:58:35 6 understand. It's an area where fluid can collect."

14:58:39 7 Defendant also asserts that Plaintiff is
14:58:41 8 shifting its construction because in *PureWick I*, Plaintiff
14:58:44 9 argued that the Van Den Heuvel reference did not have a
14:58:48 10 "fluid reservoir" because urine did not aggregate in the
14:58:52 11 area Defendant identified as a reservoir, but is now
14:58:56 12 asserting a broader construction to capture an
14:59:00 13 "indeterminant 'place'" in the PrimaFit 2.0. I am not
14:59:04 14 making any determination about infringement in this case,
14:59:08 15 but I think that Defendant is overreading what actually
14:59:12 16 happened in *PureWick I*. During that litigation, Plaintiff's
14:59:16 17 infringement expert referred to the reservoir as "the
14:59:20 18 area... the volume where urine can accumulate." As I just
14:59:24 19 mentioned, Defendant's invalidity expert testified at his
14:59:28 20 deposition that, to a POSA, a reservoir is "an area where
14:59:32 21 fluid can collect." At trial, though, he gave rather
14:59:36 22 conclusory testimony that the prior art had a reservoir. In
14:59:40 23 addition, Plaintiff's counsel argued during his closing in
14:59:44 24 connection with infringement that the accused product had an
14:59:48 25 empty space where urine can accumulate. And he argued in

14:59:49 1 connection with validity that Van Den Heuvel did not have a
14:59:53 2 "place for fluid to aggregate." I think all of this
14:59:56 3 testimony and argument from *PureWick* I is consistent with
14:59:59 4 the plain and ordinary meaning as I understand it.

15:00:01 5 So I am going to construe "reservoir" and "fluid
15:00:05 6 reservoir" to have the plain and ordinary meaning to a POSA,
15:00:08 7 i.e., a space where fluid can collect. I am not
15:00:11 8 specifically adding the word "structure" to this definition.
15:00:14 9 Plaintiff agrees that the space has to be formed by
15:00:16 10 something, some structure, but both parties agree that the
15:00:19 11 reservoir is not required to be a separate structure. And
15:00:22 12 thus, I think adding that the reservoir must be "a
15:00:25 13 structure" may be confusing.

15:00:28 14 In conclusion, the intrinsic and extrinsic
15:00:31 15 evidence support the plain and ordinary meaning of
15:00:34 16 "reservoir" and "fluid reservoir" as "a space where urine
15:00:37 17 can collect." And that is how I will construe it.

15:00:40 18 So with that, I am not going to rule on the
15:00:43 19 collateral estoppel motion orally. We'll get out an opinion
15:00:46 20 on that one because I think there are some other issues in
15:00:49 21 it rather than just this.

15:00:52 22 And I did want to tell you all, you know, we
15:01:05 23 keep track of all your discovery disputes and you have too
15:01:08 24 many. So you can have this one with Judge Hall, and after
15:01:11 25 that, any further requests will not be -- you will not get a

discovery hearing until lead counsel meet in person and discuss it and report back on those discussions.

All right. So that's all I had for today. Anything else that we need to talk about while we're here?

MR. SCHARFF: Yes, Your Honor.

MR. BIDDINGER: Nothing from Plaintiff.

MR. SCHARFF: We just wanted to apprise Your Honor of the status of discovery. We currently have a close of discovery that's set for next week. We're in discussions with PureWick regarding an extension, partly because there is the discovery dispute being heard on the 27th, and partly because there are some outstanding depositions. There was a witness that became unavailable. There are some documents we're still waiting for. We're hoping to submit something to you that will be either joint or unopposed.

THE COURT: It's not going to move the trial date?

MR. SCHARFF: Yes, we originally had a period for claim construction over the next few months we don't have to do. We have this nice empty space for the next couple of months.

THE COURT: All right. Thank you.

COURT CLERK: All rise.

(Court adjourned at 3:02 p.m.)

1 I hereby certify the foregoing is a true and
2 accurate transcript from my stenographic notes in the proceeding.

3 /s/ Dale C. Hawkins
4 Official Court Reporter
5 U.S. District Court
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